

BOARD OF ZONING APPEALS
MINUTES
November 28, 2006

The regular meeting of the Board of Zoning Appeals of the City of Wichita, Kansas was held at 1:30 p.m., on November 28, 2006, in the Planning Department Conference Room, Tenth Floor of City Hall, 455 N. Main, Wichita, and Kansas.

The following board members were in attendance:

BICKLEY FOSTER, ERMA MARHAM, DWIGHT GREENLEE, STEVEN ANTHIMIDES, JUSTIN GRAHAM, and JAMES RUANE arrived at 1:34pm

Board members absent:

Joshua Blick

City of Wichita staff present:

HERB SHANER – Office of Central Inspection present.

SHARON DICKGRAFE – City of Wichita, Law Department

The following Planning Department staff members were present:

JESS MCNEELY, Secretary.

YOLANDA ARBERTHA, Recording Secretary.

FOSTER We have a quorum with five in attendance. We will start the meeting at 1:32pm.

FOSTER First thing on the agenda is to approve the 9/26/06 minutes. I would like the record to reflect that it took Yolanda a long time to do these minutes. When I look at these minutes, I will look as to what we did and not be picky and so forth. I found that when you read them you will know exactly what happened and what was said. What comments do you have and is there a motion to the minutes?

Markham I move that the minutes be approved as presented.

Anthimides Seconded.

Foster All those in favor say aye. All opposed?

Motion 5-0 carried unanimously

Foster The next thing we have on our agenda is BZA2006-78. Jess are you ready to present?

McNeely **BACKGROUND:** The requested off-site sign is to replace a sign condemned by the City of Wichita for the Rock Road overpass, which will be constructed over Kellogg. As the City acquired this property for Kellogg right of way, an agreement in 2002 gave the

applicant the right to replace the sign on this property. The sign could not be physically replaced until site demolition took place. During the interim time, the Sign Code was revised (in 2005) to limit off-site signs along arterials in LC zoning to 300 square feet, and to exclude property within Community Unit Plans (CUP) from counting towards the linear feet of frontage required for an off site sign in LC zoning.

The application area is east of the Town East Mall, which is a CUP for a half-mile along Rock. This mile has an existing additional off-site sign at the Douglas intersection. This mile has over 3000 linear feet of LC zoning, the minimum required for a second off-site sign within a mile. However, property within CUP (which cannot count towards the linear foot requirement) accounts for all but 475 feet of the LC zoning within this mile along Rock. The applicant does not have legal non-conforming use rights to the previous sign, as the time without a sign on the site exceeds code time requirements for retaining non-conforming use rights.

ADJACENT ZONING AND LAND USE:

NORTH	“LC”	Retail commercial
SOUTH	“LC”	Limited access freeway, retail commercial
EAST	“LC”	Vacant commercial, retail commercial
WEST	“LC”	Regional shopping mall

UNIQUENESS: It is staff’s opinion that this property is unique, as the property was purchased and altered for an expressway, eliminating the original off-site sign. It is also unique in that City officials agreed to continued off-site sign use, and off-site sign regulations changed before the sign was replaced.

ADJACENT PROPERTY: It is staff’s opinion that the requested variance will not adversely affect the rights of adjacent property owners, as immediately surrounding properties are commercial uses at a major intersection of an arterial street and an expressway. Likewise, the proposed sign will no more affect adjacent property than the off-site sign, which existed at this location for many years. Likewise, nearby residential zoning and development is greater than 300 feet from the proposed sign site. 300 feet is the Sign Code minimum separation distance between off-site signs and residential property.

HARDSHIP: It is staff’s opinion that the strict application of sign regulations would constitute an unnecessary hardship upon the applicant. The applicant’s original off-site sign was removed because of a public need to expand Kellogg. Interim changes in the Sign Code would prohibit an off-site sign at this location, and would significantly reduce the size of the applicant’s original sign.

PUBLIC INTEREST: It is staff’s opinion that the requested variance would not adversely affect the public interest, as the proposed off-site sign will have no more impact on the public than the original permitted sign at this location.

SPIRIT AND INTENT: It is staff’s opinion that granting the requested variance would not oppose the general spirit and intent of the Sign Code as the original billboard at this site met the sign regulations when it was constructed, and regulations do make provisions for legal non-

conforming use rights. In this case, expressway expansion/construction prevented the applicant from maintaining legal non-conforming use rights.

RECOMMENDATION: Should the Board determine that the conditions necessary to grant the variance exist, then the Secretary recommends approval of a variance to the Sign Code section 24.04.222(2) to allow a second off-site sign with less than 3000 linear feet of “LC” Limited Commercial zoning within one mile. And, the Secretary recommends approval of a variance to the Sign Code section 24.04.222(3) to increase the permitted size of an off-site sign along an arterial street from 300 square feet to 672 square feet in “LC” Limited Commercial zoning. The Secretary recommends that these variances be GRANTED subject to the following conditions:

1. The site shall be developed in substantial conformance with the approved site plan and elevation drawings.
2. The applicant shall obtain all permits necessary to construct the signage and the signage shall be erected within one year of the the variance approval, unless such time period is extended by the BZA.
3. The resolution authorizing this variance may be reviewed for compliance with conditions by the BZA; the board may then make recommendations to staff regarding enforcement of conditions.

Dickgrafe Now Jess, the Spangle’s building is not going to be there, right?

McNeely Right.

McNeely Any questions of staff?

Foster I understand that the request is for the same size sign but it is also for the same height?

McNeely Yes, it is for the same size and the height as the size sign that was originally at the site.

Foster You may want the applicant to answer this question. Did the City literally buy out this sign?

McNeely I prefer that the applicant answer that question.

Foster At anytime, did they have a zoning or building permit to change this sign after 2002?

McNeely I do not believe so.

Foster They were not grandfather in by a request or anything to rebuild?

McNeely No, I do not believe so, because they have not pursued that route. They did not pursue the replacement of sign until such time that they came and applied for a variance.

Markham The timeframe, when they lost their non-conforming use, was this time period influenced by the time it took to complete the demolition.

McNeely As I understand it, yes.

Ruane Are there other signs there with this use? Is there one at Central?

McNeely There is one at Central and Rock. That one is north of Central, so that one is in the next mile. The other billboard within this mile is at the southeast corner of Douglas and Rock.

Ruane How similar is this sign to the one located at Central and Rock?

McNeely I would not be able to explain, but the applicant is Clear Channel, the same company that has the one at Central and Rock. The one at Central and Rock is LED type sign.

Ruane How visibly sound is the sign?

McNeely This sign will be oriented essentially east and west. So it will be visible from the north and the southbound traffic on Rock. The sign they originally had at this location was visible from Kellogg and was orientated where it could be viewed from that entire intersection. It was visible from Kellogg, and Kellogg had the higher traffic volume. With the improvements being done at the Kellogg intersection, Rock Road will be elevated over Kellogg, so this sign is losing a certain amount of visibility in that it will no longer be visible from Kellogg.

Ruane Will there be a message on both sides of this sign?

McNeely Yes, as I understand it.

Ruane Can you explain the exchange of sign rights from the transaction where the City condemned the sign that was owned by Clear Channel and the 2002 agreement that leads us to today, and if this variance was denied, what would that cost the City?

McNeely That is not something that we take into consideration. I focus on the five criteria that qualify a variance. We stay out of the economics.

Graham In the agreement, are there any specifics as to orientation or placing in this area?

McNeely No, it was specified to be on this lot, or this legally described piece of ground, but the orientation was not discussed. All that was discussed in the agreement was the existing sign rights, as they existed prior to demolition, being retained.

Foster Do you have a copy of that Jess?

McNeely Yes, we do in the file. I can get a copy.

Foster Are there any questions from any other member?

Greenlee The existing sign rights, do they have a variance for the enlarged sign? Or was the enlarged sign allowed back then?

McNeely The sign they had was permitted at the time it was put up.

Greenlee So it is the same size as this sign.

McNeely The 672 square foot sign that they originally had at this site was legal when they had it. This is a unique situation where their sign came down and the agreement was made by the City to retain sign rights, as the City had taken their sign down to expand Kellogg. And in the interim our sign code changed, which changed the size of a sign in the "LC" zoning or on an arterial and changed the way we calculate the linear footage in commercial zoning to make sure there was enough footage for the rights of a billboard.

Greenlee But the City of Wichita agreed to allow them to put their sign back when it came time to put it back, and to put it back as it was before which is what they want to do now?

McNeely Yes.

Greenlee And, this board is a part of the City of Wichita, right? We are a party to that agreement, right?

McNeely This is the BZA for the City of Wichita. This does get into some sticky situations. When the City made the agreement originally back in 2002 that the applicant would be able to, under the code at that time, legally request that sign. This is a unique situation where the codes changed which now requires a variance. This is why the case is before you today. The City officials made that decision, at that time; they could not require this body to make any decision. This body has to make a decision in this case based on the five criteria required for a variance. We see the agreement that was made as something that contributes to the uniqueness in this situation.

Anthimides Is it because the City tore the sign down that there is no grandfathering? So, all we need to decide on is to put the sign up the way they had it before?

Dickgrafte The agreement could not have foreseen the changes in the sign code. The variance is necessitated because of the sign code change. I do not view the grandfathering as an issue because they would still have to get the variance.

They did not get a building permit because the building permit would expired during the time it was taking us to demolish this property. The issue is whether the five criteria are met. Certainly even though the City entered into this agreement with Clear Channel, the city can not negate it's own laws or ordinances by the agreement which is why this board and the function of this board is to vary the land use laws in unique situations.

Foster The new sign, how would you compare the size of the old sign against the new sign?

McNeely The size of billboards now allowed in commercial zoning on an arterial is less than half from what was originally allowed. There is no doubt that the new change in the sign code was meant to reduce the size of the billboards, that is a factor to consider particularly when it comes to spirit and intent. The spirit and intent of the sign code under which the original was billboard was built met the original sign code. We have a newer sign code that has a spirit and intent of reducing the size of billboards. However, the applicant will contend, and we will see from their point of view, that they have a situation in which they were told they would be guaranteed to maintain their original rights. The newer sign code has the spirit and intent to reduce billboard size, and that is an issue to consider, while the applicant desires to maintain their original size.

Foster Are we going to continue to handle any other variances due to this improvement? Do you know of any other situation being created by this type of improvement that needs access to roads?

McNeely I am not aware of any future ones.

Foster Do you think the person who gave this approval to this company on behalf of the City, would you say they had the rank, quality, and the knowledge pertaining to this matter to make this decision?

McNeely Yes, the person who entered into this agreement is authorized to speak for the City when it comes to City owned property issues.

Foster Are there any other questions for Jess? We will call on the applicant. Will you give your name and address?

Greg Ferris, 144 S. Country Court in Wichita. Today, I am representing Clear Channel Outdoor. With me today is Ron Blue President of Clear Channel and Dave Mollhagen, the Real-estate Manager. If you have any specific questions for them, they will be more than happy to answer them. I think Jess did a great job. I will summarize some of the points and get into some of the questions that you have. I tried to take notes so I could answer them correctly. First of all, some background, this billboard at this location had an enormous value. When a condemnation case was filed on it, it literally would have cost the city hundreds of thousand dollars. Clear Channel is a good corporate citizen. They had an agreement with the City in lieu of condemnation and in lieu of a large cash payment, that we would lease some space from the City, once they had

acquired all that property. And, construct this same size and type of billboard that we had. Both the City Attorney and Jess pointed out that the code changed a year ago. We could not get a building permit at the time the agreement was signed because as the City Attorney pointed out that building permits are only good for 6 months. Until such time as all property was demolished, the City would not allow us on the site to actually do construction. So, we were in a limbo stage. No one is at fault. I do not think there is any problem here. We met with counsel member Schlapp, and other city officials in Central inspection and they all recognized that this is a very unique situation and this was the appropriate course of action to come before the Board of Zoning Appeals. I think this clearly met the five criteria. Jess pointed out clearly the uniqueness. I do not see any issues with the adjacent property. This would create a hardship on the applicant and I will be glad to answer in more detail. I want to focus along the spirit and intent of this zoning code, including the new zoning code, because Mr. Blue, Mr. Mulvane and I were all involved in the drafting of the new regulation and the intent of that regulation was in areas where there were heavy concentrations of commercial, and Kellogg and Rock Rd is a commercial center. It is very different than 21st Street, or if you were further north on Rock Rd. So I think that the spirit and intent of the zoning code is intact with this because of the type of area that this is. It is so commercial and so recognized in the community as commercial that no one would feel that the spirit of this zoning ordinance was comprised, by allowing a full size billboard in this area. To answer the question that you asked Mr. Foster, it is exactly the same size sign as was previously constructed. However, it is not the same height. It is approximately 7 feet shorter than what was there previously. The other sign was built over a building. When it is built over a building you are allowed an eight-foot separation that allows it to be taller than that 30 feet. So this is a little shorter. We answered the question why we could not get a building permit, and that is because the time would have expired. This plan at this time is to build a standard billboard that is a two face sign that you are accustomed with; but that would not preclude in the future a decision to turn this into a multifaceted sign. We would comply with all the zoning requirements without exceptions. There were no specific requirements in the agreement made on where it would be oriented. It was intended that it would be on this property as it was evaluated to be the most logical way and manner to construct this sign. So, as you evaluate the 5 criteria, you must recognize that we clearly have a unique situation. By the fact that the city condemned this sign, and made us take this sign down. In the interim, we were not allowed to rebuild this sign until the property was available. Clearly this creates a unique situation. This will have no negative impact in this area. The value lost to Clear Channel, once this sign came down, is an enormous hardship. We think there is no public interest that is being comprised in this situation. There is nothing that we are going to do to comprise health and safety. I will be glad to answer any questions.

Foster A current phrase keeps coming to my mind. Are you getting your cake and eating it too? Are you saying that the price of buying us out is included in the price of being able to rebuild it?

Ferris Actually, the only thing we were paid on this sign is the relocation cost from tearing down and reconstructing it. There was no condemnation value paid. The reason for that is very clear; they were going to rebuild the sign. They felt they would be double dipping if they took a condemnation award and still re-built the sign, so they forfeited any cash payment other than the physical cost of

removing and reconstructing the sign, that is reasonable. So we are not getting our cake and eating it to.

Foster I appreciate your answer and this is a unique case and this is probably one of the most visible signs. So, how visible is this if I am driving down Kellogg? Will I see this over the overpass?

Ferris You will not see this sign from Kellogg. You can only see this going sign north and south. You will not see this sign at all from Kellogg. Kellogg will be going down under starting back at Woodlawn so this sign will not be visible.

Foster The Kellogg traffic will be going under and will not be able to see the new sign.

Ferris It is my understanding, they lost the ability for Kellogg to view this sign, because it is going under. So not only did they give up the value of the other sign; they also gave up the value of anybody on Kellogg being able to see. They understand and they are a great corporate citizen. I have worked with them and watched how they operate in the community at various meetings, and they are great corporate citizens. They understand the importance of this intersection, and rather than trying to hold the city up, all they want to do is have something there. They settled on a Rock Road facing sign, that is still a valuable sign, but it is not the same value as what they took down. It is not the same, but it still important. As a testament to Clear Channel, this shows the corporate citizens they have tried to become.

Foster I agree with you on the uniqueness, the adjacent property, hardship and spirit and intention of the zoning regulations, even though they changed the language in doing it. I am trying to visualize this sign. To give you some idea, 48 feet is a very large size and it is going to be about 14 feet high, so this is a very big sign compared to other places.

Ferris Actually Mr. Foster, this is the standard size of every billboard in Wichita, so this is not a larger billboard. This is what you see along Kellogg, every billboard is this size. If you stand close to it, it does seem very large, but when you are driving by at 30 feet it is just a normal billboard. This is not a larger billboard than what is allowed today. We can still build these signs. I do not want you to get the idea that this is some super large billboard that we are requesting to build because it is not.

Foster Under the new sign code billboards are smaller now.

Ferris It was a standard size a year ago but not today. You are right.

Foster Any other questions?

Greenlee I was wondering will there be any lighting use on it? Is it internally lit? Or does it have any external lighting?

Dave Mollhagen with Clear Channel Outdoor Advertising, my address is 4341 N Cypress in Wichita. I am the real estate manager for Clear Channel. As far the lighting goes, on our 14 x 48 size we have exterior lighting on them that is basically two lights that shine up on the board itself. Basically, the illumination hit the board itself and hits that rectangle; we try to make sure that the lights are designed where we do not anticipate much leap over past the sign. Yes, you will have a reflection coming off and going up, but as far as illuminating the ground underneath, it does not illuminate it much unless you turn one of the lights down, then it will be like daylight there. The lights themselves are out on the edge of the cat walk and will be reflected back on the billboard itself.

Dickgrafe The sign is going to have to comply with all other existing provisions of this sign code other than the size and the distant between other existing signs. I think that if you approve this variance, I recommend that you add another condition that is clear to everyone that it is the intent of this board that all other existing provisions of the sign code clearly apply to this sign.

Mollhagen I am not at liberty to discuss that because that is the legal department. I do not know what their intents were. Our intent has always been that we do not want the City's money. What we want is our inventory. That is what we care about and that is what we are after. The City, as far as the sign goes, will be getting lease money off this sign. As far as not getting it, we have not gone down that avenue, so we have not addressed that option, because we feel like we have a good relationship with the City and the Property Management Department, and we feel we can appease everyone.

Ruane Do you know what the rental is per month?

Mollhagen As far as lease cost and what we are going to sell it for?

Ruane No. Rental that you pay to the city.

Mollhagen For this size, The City will be getting 7 or 8 thousand per year.

Ruane Is that the standard rate for billboards?

Mollhagen Well, the billboard before this paid \$13,000 but it had a Kellogg read. That is the highest we have ever paid in the City of Wichita. Yes, I feel that is a good rate. Other people disagree with me but we are not a major city such as Albuquerque, Phoenix, or any city that brings 3 times that type of money. We do not get that in Wichita.

Foster Any other questions? You were talking about the status and the about the board.

Dickgrafe I am not sure what you question is. Certainly, the BZA is a separate appointed quasi-judicial board. You are not employees of the City. You are not bound by

what the City does. Having said that, can I say what their contractual damages will be if this is not granted? No. I am not sure that is the underlining concern of this board. But, whether or not the 5 factors have been met. Are you bound by the City of Wichita previous agreement? No. Is that agreement relevant in how you decide this case? I think it is. I think staff has looked at the agreement in articulating the facts. That certainly played a factor in how this case got here. If not for the agreement and not for the condemnation and not for us tearing down the billboard, we would not be here. Then you have the intervening of the City changing the sign code. Those are pertinent facts that support the 5 criteria necessary for the BZA request.

- Ferris I think the City Attorney said exactly what Jess and I took a lot longer to say. What the City portion is in this, I do not expect you to be agents of the City. That is not at all what I am here on behalf of. I believe you are here to look at the 5 criteria and to look to see how well we fit the five criteria. I think the City Attorney correctly stated how we got here.
- Foster Does the applicant agree to the conditions? I think the need to be revised to take care of the question.
- Ferris We have no problem Mr. Foster if you want to add it to number 2 or make it number 4.
- Foster Does anyone have any suggestion on the wording?
- Dickgrafe You can add it as number 4. The sign shall comply will all other existing provisions of the Sign Code of the City of Wichita.
- Foster Do you have any problem with that?
- McNeely No.
- Foster Is there anyone else in the audience that wishes to speak regarding this issue? We will confine discussion to the board. This is not a self imposed hardship brought on by the applicant. This is a hardship that was created by the City. Do we have any discussion? One thing that influences me is that we do not have visible access to Kellogg, which is where most of the traffic is, because it is no longer viewable from all 4 sides.
- Anthimedes I move that the board accept the finding of facts as set forth in the secretary report and that all five conditions set out in section 2.12.590B of the City Code as necessary for the granting of a variance have been found to exist and that the variance be granted subject to the conditions set out in the secretary's report.
- Dickgrafe I would ask that you amend your motion to include both variances in this case.

Anthimides I move to include the 4th condition as well as to motion for both variances be granted as well.

Markham Seconded

Foster I am going to vote for this reluctantly. All in favor say aye.

Motion 6-0 approved unanimously.

Foster Now we will here item number 3 from OCI's Herb Shaner.

Herb Shaner, Central Inspection, BZA2003-13 variance to the zoning code to allow parking in the front and side street setbacks on property zoned residential. 1210 S Topeka, Lincoln Elementary, completed their parking lot and got all their landscaping in on the two sides that were required, looks very nice. Case closed.

Markham The Price Elementary what is the status on that?

Shaner That was taken care of during the Sept 26, 2006 meeting with photographs.

Anthimedes What about the property on Silverdale. I drove by there and it looks like he still has not complied with what we voted on that day.

Shaner His time is not up. I will go back and check up on it and see where he's at on that and let him know.

Dickgrafe Someone asked about the sign that was denied at 21st and Maize. OCI has issued a citation in that case and it is pending in court.

Foster Are there any questions? Do we have any cases next month, Jess?

Jess Yes, we have one case filed. Another billboard case far west on Kellogg.

Ruane I am sorry I was late. I think there are some amendments to be made on the last item of the agenda on the Price Harris School in the minutes. For example, on page 28, where I ask Herb a question, and his answer is mixed in with my question.

Ruane I move that the minutes be amended.

Foster Are you saying that the person saying it is not correct? I edited my copy and I went back and reviewed my changes and found that none of my contribution changed the context of the meaning. Would it be the consensus of the board to amend the minutes?

Markham Seconded

Foster All in favor say aye.

Motion carried 6-0

Foster Do I hear a motion to move to adjourn?

Markham Moved

Greenlee Seconded

Foster All in favor say aye

Motion carried 6-0

Adjourned 2.39pm